

AIR COMMAND AND STAFF COLLEGE

AIR UNIVERSITY

**EXAMINING THE CONTENT AND IMPLEMENTATION OF THE NEW
U.S. AIR FORCE POLICY OF RECORDING SUSPECT INTERVIEWS**

by

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Abstract

Effective 1 October 2009, the Air Force Office of Special Investigations (AFOSI) implemented a new policy wherein Special Agents are required to video and/or audio record all suspect interviews. The new policy has been outlined in AFOSIMAN 71-118V4, paragraph 4.18 and while some portions of the policy give clear and specific guidance, other portions of the policy leave more opening for interpretation or convey actions which will create challenges that must be considered. These challenges, based on the authors' personal experiences and JA-AFOSI focus groups' divergent findings, will bring about potential growing pains and heavy scrutiny in the policy's implementation and appearance in court-martial proceedings. Recommendations and conclusions from these observations will help overcome these obstacles.

While this policy and practice is new for the Air Force, it has been an established requirement for some of our sister service law enforcement agencies, other federal law enforcement agencies, and many state, city and county level law enforcement agencies. A review of how those various agencies conduct recorded interviews, as well as a review of case and statutory law, will also shed light on how the new AFOSI policy can be solidified to ensure fewer issues at the time of conducting the interviews up through the anticipated use of those recorded interviews in military courts-martial.

Even though this policy has been implemented and all AFOSI Detachments are now executing it in the field, a number of issues raised from the various sources explored in this paper remain unresolved. While implementation of this new policy will undoubtedly encounter growing pains based on these issues, it will go a long way not only in protecting the rights of the suspect and the agents engaged in their investigation, but also in ensuring enhanced fairness in the judicial process. The goal of this research paper is to offer recommendations based on the

identified issues to members of the AFOSI and JA communities to ensure a smooth implementation of the policy from the time a suspect's interview is recorded at the local AFOSI Detachment up through the time that recorded interview is used in trial by court-martial.

Introduction

Effective 1 October 2009, the Air Force Office of Special Investigations (AFOSI) implemented a new policy wherein agents are required to video and/or audio record all suspect interviews.¹ The new policy has been outlined in AFOSIMAN 71-118V4, paragraph 4.18 and while some portions of the policy give clear and specific guidance, other portions of the policy leave more opening for interpretation or convey actions which will create challenges that must be considered. These challenges, based on the authors' personal experiences and JA-AFOSI focus groups' divergent findings, will bring about potential growing pains and heavy scrutiny in the policy's implementation and appearance in court-martial proceedings. Recommendations and conclusions from these observations will help overcome these challenges.

While this policy and practice is new for the Air Force, it has been an established requirement for some of our sister service law enforcement agencies, other federal law enforcement agencies, and many state, city and county level law enforcement agencies. A review of how those various agencies conduct recorded interviews, as well as a review of case and statutory law, will also shed light on how the new AFOSI policy can be solidified to ensure fewer issues at the time of conducting the interviews up through the anticipated use of those recorded interviews in military courts-martial.

Do Other Law Enforcement Agencies Record Suspect Interviews?

In addition to conducting in-person focus groups with mid-level Judge Advocates and AFOSI Special Agents and e-mail-based questionnaires with senior Judge Advocates and AFOSI Special Agents, telephonic interviews with members of the Army and Navy Judge Advocate General Corps, the Army and Navy Appellate Courts and Army and Navy law enforcement

agencies were carried out to determine whether the law enforcement agencies within our sister services have a similar policy of recording interviews and if so, what, if any, issues they may have dealt with since implementing their policy. A review of federal and state case and statutory law was also conducted to determine what law enforcement agencies within other federal, state, city and county governments require recording of suspect interviews and how they may have dealt with issues that arose with respect to recording the interviews and their subsequent use of those recordings during trials.

U.S. Naval Criminal Investigative Service

In September 2008, the U.S. Naval Criminal Investigative Service (NCIS) implemented a policy change regarding recording of interrogations. According to the policy, “recording of interrogations by overt video or audio means within the confines of an NCIS facility having the technical capabilities for such recordings *shall* be accomplished in *all* investigations involving crimes of violence. Crimes of violence include homicide, sexual assault, aggravated assault, robbery, and crimes involving weapons. A decision not to record may be made by the Special Agent-in-Charge or his/her supervisory designee when the circumstances of investigative environment dictate that recording would be counterproductive or otherwise impede the investigation.”² The policy delineates more specific procedures that will be followed to ensure “uniformity of policy administration.”

Recently, NCIS was contacted by a Japanese delegation interested in why NCIS had adopted the policy of recording suspect interviews, when it was not required by statute or caselaw. NCIS responded that they had heard anecdotally that some juries, judges and members panels would have decided differently about the weight to be accorded a confession, if they

could view the interview and see whether it was coerced. NCIS further noted that they decided that recording interviews would ultimately save the Navy litigation costs and may even prevent unnecessary acquittals. They further advised that the experience of recording suspect interviews has been positive...that is, lately the anecdotes describe scenarios where the defense attorney reviews the videotape and decides that a motion to suppress will be futile.

U.S. Army Criminal Investigative Command

Members from the U.S. Army Criminal Investigative Command (CID) and the U.S. Army Judge Advocate General Corps were contacted to determine if they had a similar policy regarding recording of suspect interviews. According to those sources, CID does not currently have any established policy in favor of either requiring or prohibiting the recording of subject interviews. They went on to say that the decision about whether to record a particular subject's interview is left to individual Special Agents-in-Charge in the field, and is dependent upon the type of case and whether the field office has the necessary equipment and budget to accommodate recording.

Federal Bureau of Investigations

The Federal Bureau of Investigations (FBI) prohibits the use of recording equipment without the express approval of the Special Agent-in-Charge of the local FBI office.³ Section 7 of the FBI's Manual of Investigative Operations and Guidelines provides "[u]se of tape recorders for the purpose of recording the statements of witnesses, suspects and subjects is permissible on a limited, highly selective basis, and only when authorized by the SAC (special agent in charge)."⁴ Based on this policy, the FBI does not routinely audio or videotape suspect

interviews. “Critics say the FBI practice leads to botched investigations, lost evidence, unprofessional conduct and damaged credibility for America’s justice system.”⁵

A Federal District Court Judge in South Dakota openly noted his frustration with the FBI’s policy of not recording suspect interviews when he entered the following in a court order in 1999. “This is another all too familiar case in which the FBI agent testifies to one version of what was said and when it was said and the defendant testifies to an opposite version or versions. Despite numerous polite suggestions to the FBI, they continue to refuse to tape record or video tape interviews. This results, as it has in this case, in the use, or more correctly, the abuse of judicial time ... There is no good reason why FBI agents should not follow the same careful practices [of recording interviews] unless the interview is being conducted under circumstances where it is impossible to tape or record the interview.”⁶ The judge went on to rule that in future cases when defendants’ statements are offered into evidence, and they “are not taped or video recorded and there is no good reason why the taping or recording was not done and there is a disagreement over what was said, this Court intends to advise juries of exactly what is set forth in this Order and explain to the jury that FBI agents continue to refuse to follow the suggestions of [the district court judges] and why, in the option [sic] of the court, they refuse to follow such suggestions.”⁷

Various State, City, County Law Enforcement Agencies

In 1980, the Supreme Court of Alaska informed Alaska law enforcement officials that “it is incumbent upon them to tape record, where feasible, any questioning [of criminal suspects,] and particularly that which occurs in a place of detention.”⁸ The Court observed in another case that year that “an electronic record of such interviews ‘will be a great aid’ when courts are called

upon to determine the circumstances of a confession or other waiver of [a suspect's] *Miranda* rights.”⁹ In a third case, the recording requirement that had been laid out previously by the Court was repeated, with the further statement that “if *Miranda* rights are read to the defendant, this too should be recorded.”¹⁰ In 1985, the Court held that “an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.”¹¹

In making its ruling in 1985, the Alaska Supreme Court noted that they were not the first legal body to recognize the importance of recording suspect interviews and they cited to the State of Texas which requires “that oral statements of the accused during custodial interrogations must be recorded to be admissible.”¹² The District of Columbia, Illinois, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, and Wisconsin have followed suit through the years and similarly require the recording of suspect interviews either through case law or through statute.¹³ According to the National Association of Criminal Defense Lawyers website, in addition to those states which require recording of suspect interviews, more than 700 police departments and county sheriff’s departments throughout the United States have voluntarily adopted procedures for recording suspect interviews.¹⁴

History of New AFOSI Policy

In addition to the email questionnaires sent to senior Judge Advocates and senior AFOSI agents, telephone interviews were also conducted with senior AFOSI members to discuss the history and decision making process which lead to implementation of the policy. Some of the

factors considered by AFOSI included the following: NCIS implemented its policy of recording suspect interviews in 2008; state and local law enforcement policies were increasingly moving to recording suspect interviews; several states had legislation requiring recording of suspect interviews; members of the AF Judiciary had become increasingly vocal about recording suspect interviews, citing a lot of wasted court time hearing motions and agent testimony on something they could decide much easier/faster if the suspect interviews had been recorded; trial and defense attorneys said AFOSI was leaving agents “dangling in the testimonial winds” by saying (in policy) they can record interviews but were not mandating it; AFOSI agents were subjected to cross-examination questions as to why they didn't record suspect interviews, implying they were either lazy or were hiding something; local and state police investigators started commenting about their experiences with recording, many (who were formerly skeptical) saying it was the right move to make; and, with all of the television shows about crime investigations, there arguably isn't any real “tradeecraft” left to protect. With all of this, AFOSI anticipated that it was just a matter of time before the military courts would require them to start recording suspect interviews. AFOSI then took the time to conduct working groups which included members from the Air Force, Army and Navy Judge Advocate General Corps and law enforcement personnel to develop the 1 October 2009 policy.

Review / Critique of New AFOSI Policy

In addition to the research conducted for the foregoing, two in-person/live focus groups, one involving six mid-level Judge Advocates and one involving six mid-level AFOSI agents, were conducted. Each of the participants was asked to provide answers to specific questions related to the implementation of the new AFOSI policy of recording interviews. Those questions which raised the most discussion among the focus groups, along with a synopsis of the responses

from the focus group participants, were then forwarded to senior Judge Advocates (including Staff Judge Advocates, Senior Trial Counsel, Senior Defense Counsel, and Air Force Court of Criminal Appeals judges) and senior AFOSI agents (including senior staff, Wing-level and Squadron Commanders and civilian equivalents) for their input. Responses were received from six senior Judge Advocates and six senior AFOSI agents. The following are the key issues discussed among all participants, along with a synopsis of their responses.

Based on your experience as a Judge Advocate or AFOSI agent, do you think this new policy is a good or bad thing? The responses from both mid-level and senior Judge Advocates were overwhelmingly positive while the responses from mid-level and senior AFOSI agents were somewhat mixed. One mid-level Judge Advocate went so far as to say implementation of the new policy is “absolutely a wonderful thing” and one senior AFOSI agent said implementation of the policy is “an exceptional idea.” Many felt the implementation of this new policy was a good idea because the recorded interview will serve as a factual record of the interview with the exact words spoken by the suspect and the agents as well as the demeanor of the suspect and the agents involved...all of which would be beneficial during pre-trial motion hearings and actual trial proceedings. One senior AFOSI agent said “Recording interviews will provide juries and prosecutors with information they previously didn’t have, such as subject’s body language, other non-verbal behaviors, admissions and demeanor... all of which are relevant bits of information that can sway decisions as to a subject’s guilt or innocence or even influence a prosecutor’s decision to pursue prosecution. Additionally, recording interviews will provide an excellent training opportunity for young and seasoned agents. Being able to watch an interview with the agent for critiquing purposes is an excellent teaching tool.” Lastly, mid-level and senior AFOSI agents commented that based on their experiences, suspects being interviewed for

minor offenses (that might not be considered for recording initially) occasionally make statements or admissions related to other minor or more serious offenses.

Those who were opposed to the new policy expressed the following concerns: one mid-level Judge Advocate said “I haven’t needed a recording before to get a conviction, so why do we need them now;” most of the mid-level AFOSI agents said they were concerned about having to defend their interview techniques on the witness stand, to include the use of deception, and how they would be portrayed to panels; some mid-level AFOSI agents were concerned that the agents would be too worried about what they were saying on the recording to have a good in-depth interview; some AFOSI agents were concerned that suspects would not be forthcoming if they were being recorded; and lastly, like the previously mentioned mid-level Judge Advocate, some mid-level AFOSI agents generally questioned why there was a need for recording when convictions have come without the recordings in the past.

Agents who were reluctant to embrace the policy seemed to focus on how the actions of agents would be perceived by external audiences. In response to this concern, the author notes a 1993 study for the National Institute of Justice, which included participants from various roles in law enforcement as well as prosecution and defense attorneys, also disclosed “strong arguments” against videotaping.¹⁵ That study found those arguments were “primarily by practitioners who had never used videotaping and had no firsthand knowledge of its costs and benefits.”¹⁶

The 1993 study also touched on the agents’ concerns of defending their interview techniques on the witness stand, to include the use of deception, and how they would be portrayed to panels. As for the effect on convictions and sentences, the 1993 study found that “police departments and prosecutors reported that videotaped interrogations helped them to

negotiate more guilty pleas and longer sentences and secure more convictions. However, tapes sometimes work for the defense, too, such as by indicating that a confession was coerced or by leading a judge to impose a lesser sentence on a demonstrably contrite defendant.”¹⁷ “Public confidence in police practices increases with electronic recording.”¹⁸

In response to the concern that suspects would not be as forthcoming if they were being recorded, a 1998 study for the International Association of Chiefs of Police reported “little conclusive evidence” that videotaping affected suspects’ willingness to talk.¹⁹ Instead, researchers found “the majority of agencies that videotape found that they were able to get more incriminating information from suspects on tape than they were in traditional interrogations.”²⁰

Do you think AFOSI should record *all* suspect interviews or should they only record suspects accused of the more serious offenses...i.e., rape, murder? The policy as written requires AFOSI to record all suspect interviews unless unique circumstances preclude recording. According to the policy, some of those unique circumstances might include “interviews conducted outside of an AFOSI facility, utterances made by a subject during transport, [or] when equipment problems develop and cannot be corrected prior to an interview.” Everyone who responded to this question, either through the focus groups or through e-mail questionnaires, agreed that *all* suspect interviews should be recorded. All of those contacted thought that giving AFOSI agents the discretion on recording only “serious” offenses would open up such decisions to scrutiny and would raise the questions of what, exactly is a “serious” felony and what isn’t and, ultimately, a “Why was suspect A recorded and not suspect B” dilemma. One mid-level AFOSI agent noted that “all suspect interviews are important not only to the agent and his or her investigation, but possibly more important to the suspect and therefore

all suspect interviews should all be given the same level of effort.” Another AFOSI agent noted that “crafting a policy of major versus minor offenses would be too subjective.”

The survey from 1993 for the National Institute of Justice found the following:

“Videotaping suspects’ statements and interrogations is most prevalent in felony cases---the more severe the felony, the more likely videotaping will be used. Homicide suspects’ statements were taped by 83 percent of the surveyed agencies that used videotaping. The majority of the videotaping departments also made some use of video documentation of interrogations in the other types of violent crimes—rape, aggravated battery and assault, and armed robbery—as well as in drunk driving cases.”²¹

Do you think AFOSI should obtain the consent of the suspect before recording the interview? Should the suspect have the option of not being recorded or stopping the recording in the middle of the interview? If this option stays in the policy, should AFOSI and the JA community help draft a common language notice to be read to the individual clearly laying out that they have asked recording be stopped prior to termination of taping? The policy as written does not require the agent to obtain the consent of the suspect; however, the local Detachments are required to post 8.5 x 11 inch signs throughout the facility that state “Attention: All persons are subject to audio or video monitoring and/or recording while in this facility.” The policy does allow the suspect to stop the recording but the AFOSI agent must advise the suspect that “recording ensures an objective, true, and accurate record of the interview, and therefore, continuing to record may be to the interviewee’s benefit.”

For the most part, participants in the focus groups and in the email questionnaires agreed that there was no need to obtain consent of the suspect prior to questioning. There was a split

amongst the participants, however, when it came to whether to let the suspect stop the interview. Many felt that allowing the suspect to stop the recording gave the suspect too much control in the interview process. Others said that with the signs that would be posted, there was no expectation of privacy so why should the suspect have the choice of being recorded or not? After much discussion, most participants did ultimately agree that if the only way the suspect would continue with the interview was to stop the recording, then they would be inclined to stop the recording.

NCIS policy requires the posting of signs in the facility that read “ROOM SUBJECT TO AUDIO/VIDEO RECORDING AT ALL TIMES” and does not require any additional notice to suspects or requests for their consent prior to conducting interrogations. Like the current AFOSI policy, NCIS policy provides “[i]f the person being interrogated objects to being recorded, the recording equipment shall be immediately turned off and remain off throughout the interrogation and statement taking process.”²²

The Fourth Amendment of the U.S. Constitution provides that “[t]he right of the people to be to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²³ The issue of whether recording suspect interviews is a violation of the suspect’s Fourth Amendment rights has been dealt with in various courts. The outcome has been that there is no reasonable expectation of privacy in an interrogation room and thus no violation of the suspect’s Fourth Amendment rights.²⁴

A California Superior Court found no Fourth Amendment violation in a case involving an arrested juvenile who requested to speak with his mother at the police station. While talking in

an interrogation room, the juvenile made incriminating statements to his mother which were recorded by the police and later offered during the trial. In that case, the Court noted that “no representations or inquiries were made as to privacy or confidentiality” and the Court denied the defense motion to suppress the juvenile’s statements.²⁵ In Virginia, an arrested individual was taken through the backdoor of the police station and did not pass a sign posted in the front lobby advising those who enter that “interview rooms were electronically monitored and may be recorded.”²⁶ In that case, even though the arrested individual did not have actual notice that the interview room was subject to monitoring/recording, the Court noted that other federal courts continue to find a suspect has no reasonable expectation of privacy in areas controlled by the police; that interrogation rooms are designed for disclosure, not the hiding, of information; and they recognized that the detective involved in the investigation did nothing to “lull” the suspect into believing his conversation would not be monitored.²⁷

In the situations just discussed, the Fourth Amendment did not prevent the recording of suspect interviews or conversations in an interrogation room. However, some states still have more restrictive statutes that require all parties to a conversation to consent to its recording before it may be lawfully recorded. Therefore, it is imperative for AFOSI agents to work in conjunction with their local Judge Advocates in military cases and also in conjunction with state law enforcement and state prosecutorial authorities in joint cases to understand the case and statutory laws in place in their region.

Should AFOSI also record interviews of alleged victims and/or witnesses? The policy as written gives discretion to AFOSI regarding victim/witness interviews. Interestingly, the overwhelming majority of all Judge Advocates and AFOSI agents in our focus groups were adamant that adult victims should *not* be recorded; however, they all wanted to continue with the

policy of recording child victim interviews. The overriding concern from all participants regarding recording of adult victim interviews was the potential “re-victimization” of victims and the chilling effect recording equipment would have on victims and/or witnesses.

A few participants thought victim interviews should be recorded. A senior AFOSI advisor had this to say, “Adult complainants should be recorded to ensure an equal playing field. I have seen LOTS of complainants who maintain they did not say something and did not include it in their statement. That’s not fair to the subject of the investigation.” This individual went on to elaborate on cases where alleged victims went to the press or other media outlets and claimed things they never said in their AFOSI interviews. A senior Judge Advocate said “I would tend to favor recording victim interviews regarding crimes against persons where perceptions, sequences of events, or identifications are significant.” Lastly, another senior Judge Advocate said “Victim/witness interviews should be recorded as well. The policy considerations behind non-recording (chilling effect, embarrassment, ensuring cooperation, etc.) are infinitely less significant than the potential consequences brought about by their [recorded] statements.”

A number of Judge Advocates and AFOSI agents commented on possible logistical issues with respect to recording suspects, victims, and/or witnesses. What if multiple suspects, victims and/or witnesses were in the AFOSI facility at the same time for interviews? The policy as written states “[i]nterview rooms in AFOSI facilities shall be equipped with the capability to electronically record interviews” but does not elaborate on how many rooms shall be equipped with that capability or what to do in the situation of multiple individuals being interviewed at the same time.

Should the Air Force Security Forces Office of Investigations (SFOI) implement a similar policy of recording suspect interviews? Currently there is no such policy in place for SFOI. Some of the participants felt that SFOI investigations did not warrant having a similar policy of recording interviews due to the “misdemeanor” nature of the offenses they investigate. However, other participants felt that all Air Force law enforcement agencies should function under the same rules and therefore SFOI should implement a similar policy of recording suspect interviews. Interestingly, it was brought up in different discussions that based on an AFOSI-SFS agreement in 2007, SFOI would take on more responsibility in illegal drug investigations involving simple use and possession. This has increased the likelihood of SFOI offices becoming more engaged in what the Department of Defense and USAF would consider felony activity which would raise to the level of action through court martial. This fact alone could make SFOI and SFS more open to questions by counsel in future court-martial proceedings as to why they cannot produce audio or videotaped recordings of their interviews.

Is having the suspect in the video recording sufficient or should the AFOSI agent(s) also appear in the video recording? Currently, the policy only requires a close frontal video shot of the suspect but makes no other requirements. The participants were evenly split on their responses to this question. Some felt the policy was adequate with its requirement of having only the suspect in the video. A few mid-level AFOSI agents raised a concern for the safety of the interviewing AFOSI agents if they were present in the video. Other participants felt that all members in the interview room should be included in the video.

A senior AFOSI advisor commented that AFOSI has the technology to have both the suspect and the agents in the video, so why not do that? There have been numerous incidents when this individual had to speak to or testify to the use of the Reid technique, proximities of

interviewing AFOSI agents and suspects, and the setting of the interview room. Having a complete view or multiple views of the interview room and all participants would have been beneficial during those times. In addition, one study revealed “that electronic recordings of police interrogations can have certain biases if not conducted properly. The point-of-view bias, the most prominent one, suggests that the positioning of the camera can adversely affect the objectivity of the interrogation and not provide the police and courts all of the protections discussed. For example, a video camera that records only the suspect would not preclude the defense from making a claim that officers outside the lens of the camera pointed weapons at him, thus coercing a statement. When the camera focuses solely on the suspect, the amount of pressure placed on him can be underestimated.”²⁸

Should AFOSI keep the video recordings of all suspects as part of the case file or should the video recordings be treated as “evidence?” Currently, the policy specifies that videotaped interviews will be collected and stored as evidence and states that AFOSI offices should seek destruction (as part of evidence disposition) of videotaped interviews kept as evidence prior to the case being archived. There are different maintenance and disposition requirements depending on whether the recordings are treated as part of the case file or treated as evidence. Those different requirements will be discussed shortly. However they are treated, the goal is to ensure the recordings are maintained a sufficient period of time for proper adjudication of the offender(s) for the offense(s).

The majority of those responding felt the recordings should be treated as evidence so that they would be maintained until completion of any judicial process, to include any appellate process, after coordination with the local Staff Judge Advocate. One Senior Judge Advocate noted that while the “value of the files will diminish following completion of the appellate

process, there are still circumstances where the files may be useful, for example, a parole board may wish to view the files for lack/presence of remorse during [the] confession.”

Others felt that the recordings should be treated the same as agent notes so that they would be maintained permanently as part of the case file. One senior AFOSI agent stated “I see no benefit in treating the recordings as evidence. Treating them as evidence adds an additional administrative burden that I don’t feel is necessary. AFOSI does not treat original written statements/confession from subjects as evidence, so I question why we treat recordings as evidence. Others who were opposed to keeping the recordings as part of the case file mentioned the Freedom of Information Act and the anticipated requests for copies or transcripts of the recordings. Specifically there was concern over cost and additional manpower needed to respond to such requests. Because this issue was raised by a number of participants, pertinent portions of the FOIA are referenced below:

The Freedom of Information Act (FOIA), 5 USC 552, generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by a number of exemptions or exclusions listed below:

Exemption (b)(7)(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings."

Exemption (b)(7)(B) protects "records or information compiled for law enforcement purposes (the disclosure of which) would deprive a person of a right to a fair trial or an impartial adjudication.

Exemption (b)(7)(C) provides protection for personal information in law enforcement records the disclosure of which "could reasonably be expected to

constitute an unwarranted invasion of personal privacy.

Exemption (b)(7)(D) provides protection for "records or information compiled for law enforcement purposes which could reasonably be expected to disclose the identity of a confidential source and information furnished by a confidential source."

Exemption (b)(7)(E) provides protection to all law enforcement information which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcements investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

Exemption (b)(7)(F) permits the withholding of information necessary to protect the physical safety of "any individual" when disclosure of information about him "could reasonably be expected to endanger his life or physical safety."

Exclusion (c)(1) authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from the FOIA's reach.

Exclusion (c)(2) provides that "whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party, the agency may treat the records as not subject to the requirements of the FOIA unless the informant's status has been officially confirmed.

Exclusion (c)(3) pertains only to certain law enforcement records that are maintained by the Federal Bureau of Investigation.²⁹

Current Maintenance and Disposition Requirements

According to HQ AFOSI/XILI File Repository personnel, AFOSI case files are maintained in the local AFOSI detachments until the case is closed and then they are forwarded to AFOSI's staging area in Waldorf, Maryland and maintained, generally speaking for 25 years. The case files will stay in Waldorf for 9 to 10 years and then are sent to the Washington National Records Center for the remainder of their retention period. AFOSI's retention schedule is currently being updated to lengthen the amount of time to 65 years. When their retention is met

(25 or 65 years), the files are destroyed. Following are excerpts from the publication authority regarding maintenance/disposition of AFOSI case files, AFOSIMAN 71-121, PROCESSING AND REPORTING INVESTIGATIVE MATTERS:

4.18. Use of AF Forms 3986 and 3987, Case File Documents Outer and Inner Envelope.

4.19.3. All electronic notes, voice recordings, or other digital information not attached or documented within an activity Narrative or Note field will be downloaded onto a compact disc (CD) or to a floppy disk and maintained as a digital copy in the AF Form 3986, or AF Form 3987. Personnel must ensure exact copies of information collected on PDA or other digital devices are promptly transferred onto a more permanent media storage device, such as a CD or floppy disk, and maintained with the record copy investigative file. This also includes digital pictures taken with a digital camera.

9.4. Storing Files. HQ AFOSI/XILI-Waldorf is the only office authorized to maintain record copies of closed, screened and authenticated files. ***Note: AFOSI/XILI does not maintain "evidence".

9.4.1. HQ AFOSI/XILI-Waldorf can delegate to headquarters offices the authority maintain record copies of closed, screened and authenticated files, charge out, or dispose of investigations. See table 9.1 for designated repository offices.

9.4.2. Other AFOSI units (squadron, region, and HQ AFOSI elements) may maintain working copies until no longer needed. Destroy 90 days after receipt of record copy by HQ AFOSI/XILI-Waldorf or when no longer needed, whichever is sooner.

Upon completion of an investigation, a Report of Investigation (ROI) is provided to the suspect's Commander and the Office of the Staff Judge Advocate. If the investigation leads to a prosecution, a Record of Trial will be prepared and will include transcripts of the court-martial proceedings and will also include any evidence that was introduced during the trial. Base legal offices have certain requirements regarding the maintenance and disposition of Records of Trial and the included evidence. The original Record of Trial is forwarded to the Air Force Legal Operations Agency, Military Justice Division (AFLOA/JAJM) for appellate review processing.

The base legal office maintains a copy of the Record of Trial and that copy is destroyed one year after receipt of notice of completion of appellate review. This comes from Table 51-03 Rule 6 in the Air Force Records Disposition Schedule (RDS). All records created as a result of processes prescribed in AFI 51-201 (including Records of Trial) are maintained in accordance with AFMAN 33-363, Management of Records, and disposed of in accordance with the Air Force Records Disposition Schedule (RDS) located at <https://www.my.af.mil/gcss-af61a/afrims/afrims/>.

Personnel from the Air Force Court of Criminal Appeals were contacted regarding their involvement in the maintenance and/or disposition of Records of Trial. When a case is docketed with the Air Force Court of Criminal Appeals, the Court maintains custody of the original Record of Trial for only as long as it takes to render a decision in the matter. Once a decision is rendered or an applicable Order of the Court is issued (in the case of a response to an Appeal Under Article 62, UCMJ or a Petition for Extraordinary Relief), the Record of Trial is then returned to AFLOA/JAJM where they hold it for the prescribed period that is afforded to the appellant to file their appeal to the United States Court of Appeals for the Armed Forces (CAAF). If a matter is appealed to CAAF, the Record of Trial is then forwarded to CAAF by AFLOA/JAJM. After speaking with a member of AFLOA/JAJM, the author learned that they maintain original Records of Trial permanently. They keep the original Records of Trial at their office for one year before staging them at the National Records Center. The originals are retired in their paper form and all exhibits are retained in the original Record of Trial.

Recommendations for Policy Amendments/Implementation

Based on the experience of the author, the implementation of this policy is a good thing and long overdue. This policy will allow all involved in the judicial process, from the AFOSI

agent and the suspect to the trial and defense counsel to the military judge and members on the court-martial panel, to observe for themselves what transpired in the interview room. This policy will likely reduce the number of pretrial motions filed where the defense moves to suppress an accused's statements claiming that those statements were acquired through coercion.

Regarding whether to record some or all suspects, it is recommended that the policy remain as written and that AFOSI record *all* suspect interviews, regardless of the level of or nature of the suspected offense, whenever it is feasible to do so. Times that it might not be feasible include having multiple suspects in for interviews at the same time...logistically this would be a nightmare.

Regarding whether to obtain the suspect's consent before recording, it is recommended that the policy remain as written and that AFOSI should not be required to obtain the consent of the suspect before recording the interview. The signage that is now required under the new policy is sufficient for military cases. AFOSI should coordinate with state law enforcement and state prosecutorial authorities in joint cases to understand the case and statutory laws in place in their region.

Regarding whether or not the suspect should be allowed to stop the recording, the suspect should not normally have the option of stopping the recording. However, if the suspect will continue with an interview only if not being recorded, then the AFOSI agent should turn off the recording equipment only after a discussion is had with the suspect regarding the importance of being recorded. The AFOSI and JA communities should work together to draft a common language notice to be read to the suspect clearly laying out that they have asked recording to be stopped but that they want to continue with their interview.

Regarding whether or not to record interviews of alleged victims and/or witnesses, AFOSI should not be required to record interviews of victims and/or witnesses as a normal course of action. That said, the reasoning offered concerning not videotaping victims of violent crimes, specifically sexual assault, should be further researched to determine if concerns about “re-victimization” outweigh potential positive benefits of videotaped contacts with law enforcement such as reduced statement completion times, additional credence in what was actually communicated to law enforcement, etc. There may be times when there would be value in recording certain victims and/or witnesses and AFOSI should coordinate with the local Judge Advocates before proceeding in these cases.

Regarding whether SFOI should be required to implement a similar policy of recording suspect interviews, SFOI should strongly consider implementing a similar policy. So many law enforcement agencies are following this sort of policy and Air Force law enforcement agencies should operate under the same or very similar rules for all of the same reasons AFOSI has chosen to implement this policy. It is the opinion of this author that it will only be a matter of time until the contradiction between the investigative agencies will be attacked in trial settings.

Regarding whether the suspect only or all agents should be in the video recording, everyone involved in the suspect interview should be in the video. At the core of this policy is the expected benefit of escaping potential attacks of what is occurring in the interview room. By not recording all of the activity in the interview room, that benefit may be lost and new grounds for challenge or argument may be raised.

Regarding whether to treat the recordings as evidence or as part of the case file, honestly, the author is torn as to a recommendation. Regardless of how they are maintained, the author offers the following for consideration as a supplement to the policy:

- (a) Every electronic recording of a suspect interview shall be clearly identified and catalogued by law enforcement personnel.
- (b) If a criminal proceeding is brought against a person who was the subject of an electronically recorded interview, the electronic recording shall be preserved by law enforcement personnel until all appeals, post-conviction and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired. AFOSI shall coordinate this disposition with the local Staff Judge Advocate.
- (c) If no criminal proceeding is brought against a person who has been the subject of an electronic recorded interview, the electronic recording shall be preserved by AFOSI until all applicable state and federal statutes of limitations bar prosecution of the person. AFOSI shall coordinate this disposition with the local Staff Judge Advocate.³⁰

Conclusion

AFOSI's implementation of this policy to record suspect interviews provides a safeguard which will ensure protection of an accused's rights...right to counsel, right against self-incrimination, and right to a fair trial. At the same time, the implementation of this policy to record suspect interviews provides protection to AFOSI agents from false claims of coercion and improper conduct.

Bibliography

5 U.S.C. 552, Freedom of Information Act.

Ahmad v. Superior Court. 263 Cal. Rptr. 747 (Cal. App. 2 Dist. 1989), cert. denied, 498 U.S. 834 (1990).

Air Force Office of Special Investigations Manual 71-118V4.

Belmar v. Commonwealth, 553 S.E.2d 123 (Va. App. Ct. 2001).

Federal Bureau of Investigations memorandum, 23 Mar 2006.

Geller, William A. "Videotaping Interrogations and Confessions." *The FBI Law Enforcement Bulletin*. 1 Jan 1994.

Mallott v. State, 608 P.2d 737 (Alaska 1980).

McMahan v. State, 617 P.2d 494 (Alaska 1980), cert. denied, 454 U.S. 839, 102 S.Ct. 146, 70 L.Ed.2d 121 (1981).

National Association of Criminal Defense Lawyers website; http://nacdl.org/sl_docs.nsf.

Ragan v. State, 642 S.W.2d 489, 490 (Tex.Crim.App.1982); Tex.Code Crim.Proc.Ann. art. 38.22, § 3 (Vernon 1979).

S.B. v. State, 614 P.2d 786 (Alaska 1980).

Schott, Richard G. "Warrantless Interception of Communications: When, Where, and Why It Can Be Done." *The FBI Law Enforcement Bulletin*. 1 Jan 2003.

Stephen v. State, 711 P.2d 1156 (Alaska 1985).

Sullivan, Thomas P. "Recent Developments—Electronic Recording of Custodial Interrogations: Everybody Wins." *The Journal of Criminal Law and Criminology*, Vol. 95, No. 3 (2005).

United States v. Azure, No. CR 99-30077, 1999 WL 33218402 (D.S.S. Oct 19, 1999).

U.S. Constitution, Fourth Amendment.

U.S. Naval Criminal Investigations Service memorandum, dated 4 Sep 2008.

Wagner, Dennis. "FBI's Policy Drawing Fire Interrogations Not Taped." *The Arizona Republic* 6 Dec 2005.

Weidel, Brad R. "Revealing Incummunicado: Electronic Recording of Police Interrogations." *The FBI Law Enforcement Bulletin*. 1 Dec 2006.

¹ AFOSIMAN 71-118V4, paragraph 4.18

² U.S. Naval Criminal Investigative Service Memorandum, dated 4 Sep 2008

³ Federal Bureau of Investigations Memorandum, dated 23 Mar 2006

⁴ Dennis Wagner. "FBI's Policy Drawing Fire Interrogations not Taped." *The Arizona Republic*, Dec. 6 2005

⁵ Ibid.

⁶ United State v. Azure, No. CR 99-30077, 1999 WL 33218402 (D.S.D. Oct 19, 1999)

⁷ Ibid.

⁸ Mallott v. State, 608 P.2d 737 (Alaska 1980).

⁹ S.B. v. State, 614 P.2d 786 (Alaska 1980).

¹⁰ McMahan v. State, 617 P.2d 494 (Alaska 1980), cert. denied, 454 U.S. 839, 102 S.Ct. 146, 70 L.Ed.2d 121 (1981).

¹¹ Stephen v. State, 711 P.2d 1156 (Alaska 1985).

¹² Ragan v. State, 642 S.W.2d 489, 490 (Tex.Crim.App.1982); Tex.Code Crim.Proc.Ann. art. 38.22, § 3 (Vernon 1979).

¹³ National Association of Criminal Defense Lawyers website; http://nacd1.org/sl_docs.nsf

¹⁴ Ibid.

¹⁵ William A. Geller. "Videotaping Interrogations and Confessions." *The FBI Law Enforcement Bulletin*. 1 Jan 1994.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Brad R. Weidel, "Revealing Incummunicado: Electronic Recording of Police Interrogations." *The FBI Law Enforcement Bulletin*. 1 Dec 2006.

¹⁹ Dennis Wagner. "FBI's Policy Drawing Fire Interrogations not Taped." *The Arizona Republic*, Dec. 6, 2005

²⁰ Ibid.

²¹ William A. Geller. "Videotaping Interrogations and Confessions." *The FBI Law Enforcement Bulletin*. 1 Jan 1994.

²² U.S. Naval Criminal Investigative Service Memorandum, dated 4 Sep 2008

²³ U.S. Constitution, Fourth Amendment

²⁴ Richard G. Schott. "Warrantless Interception of Communications: When, Where, and Why It Can Be Done." *The FBI Law Enforcement Bulletin*. 1 Jan 2003.

²⁵ Ahmad v. Superior Court, 263 Cal. Rptr. 747 (Cal. App. 2 Dist. 1989), cert. denied, 498 U.S. 834 (1990).

²⁶ Belmar v. Commonwealth, 553 S.E.2d 123 (Va. App. Ct. 2001)

²⁷ Ibid.

²⁸ Brad R. Weidel. "Revealing Incummunicado: Electronic Recording of Police Interrogations." *The FBI Law Enforcement Bulletin*. 1 Dec 2006.

²⁹ Freedom of Information Act, 5 U.S.C. 552.

³⁰ Adapted from Model Bill for Electronic Recording of Custodial Interrogations included in Appendix to "Recent Developments—Electronic Recording of Custodial Interrogations: Everybody Wins." Thomas P. Sullivan, *The Journal of Criminal Law and Criminology*, Vol 95, No. 3 (2005).